

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
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)	
Digital Broadcast Copy Protection)	MB Docket No. 02-230
)	

**COMMENTS OF
THE AMERICAN FOUNDATION FOR THE BLIND**

The American Foundation for the Blind (AFB) is a leading national resource for people who are blind or visually impaired, the organizations that serve them, and the general public. The mission of AFB is to enable people who are blind or visually impaired to achieve equality of access and opportunity that will ensure freedom of choice in their lives.

AFB submits these comments in response to the above captioned Federal Communications Commission (FCC) Notice of Proposed Rulemaking (NPRM) seeking comment on whether a regulatory copy protection regime is needed to protect digital broadcast television.

ISSUES OF GENERAL CONCERN

Before introducing our comments with respect to information access problems for people who are blind or visually impaired which can result from inappropriate use of digital copyright laws and restrictive technologies, we must respectfully conclude that this Notice is far too speculative to provide the basis for a Report and Order on digital broadcast copy protection.

The Commission carefully attempts to circumscribe the scope of this NPRM as a means of developing digital broadcast copy protection in order to prevent unauthorized copy and redistribution of digital media thereby removing impediments to transition to digital television identified by one key sector of digital media producers.

However, AFB feels very strongly that the basic construct of the NPRM fails in this objective in that it proposes so many overarching and speculative questions about proposed regimes of copy protection, all of them quite thoughtfully constructed, that the net effect is to give this Notice more the character of a Notice of Inquiry. Question 4's introductory sentence provides an example: ***"If a digital broadcast flag or other regulatory regime is needed"***(emphasis added), we seek comment on whether the Commission should adopt rules or ***"create some other mechanism to resolve outstanding compliance, robustness, and enforcement issues"***(emphasis added). The Commission is correct to identify these issues. Comments related to them can undoubtedly assist in determining a proper course of action either for the Commission or for Congress. The broad scope of issues related to compliance, robustness, and enforcement, suggests to us that the Commission is not yet at the stage where responses can yield the specificity required by a Report and Order. The same is true in the broad scope of copy technology which is discussed along with issues related to how such technology would be evaluated and approved

for digital broadcast use. However, the questions raised are excellent and we respond below to those which affect copyright and fair use of digital media by people who are blind or visually impaired.

DIGITAL BROADCAST COPY PROTECTION: ACCESS ISSUES FOR PEOPLE WHO ARE BLIND OR VISUALLY IMPAIRED

We have a long standing interest in insuring access to published information for people who are blind or visually impaired and have historically sought better means for providing such information. In fact, most of the milestones in our history are achievements which significantly enhanced access to information. At the same time, as a producer of conventional and electronic media, and as a partner of copyright holders, we remain firmly committed to insuring the rights of producers, while insuring non-infringing, fair use of materials in all of these formats. In short, we consider access to information to be profoundly critical.

We are very concerned that digital broadcast copy protection constructed without clear emphasis to fair use, including:

- the right to access and appropriately manipulate any user-level controls;
- fair use deconstruction of protected material in order to re-purpose content into accessible formats, and;
- clear demarcation of media in a manner which allows a consumer to know that use may be restricted,

will significantly impair our ability to access the new transport mechanisms and content formats which digital broadcast may take, including, but by no means limited to, digital television broadcasting.

Measures which protect digital media copyright must allow for established fair use of the media and for the continued fair use development access. This means that:

- all “service menus” are fully accessible either directly on the device or via ancillary equipment interconnected to the DTV devices;
- protection of fair-use privileges to circumvent copy protection for the development of ancillary assistive technology for the purpose of assuring fair use of the media, and;
- devices must be allowed to interconnect without reduction in functionality and without prohibitive costs for licensing.

We respectfully remind the Commission that the legislative history of the 1976 Copyright Act contains a section relating to fair use defense by people who are blind:

While the making of multiple copies or phonorecords of a work for general circulation Requires the permission of the copyright owner, a problem addressed in section 710 of the bill, the making of a single copy or phonorecord by an individual as a free service for a blind person would properly be considered a fair use under Section 107.

H.R. Rep. No. 94-176, 94th Cong., 2d Sess. (1976).

Therefore, we are very much concerned that unrestrained measures which block access to information protected by U.S. copyright law, under the guise of protecting digital broadcast, may severely restrict our fair use-based access to the newest and, potentially, the easiest and most timely information in our long history.

BROADCAST FLAG ISSUES

Quite properly, the Commission asks for comments with regard to a range of mechanisms which provide digital broadcast copy protection. However, the Notice also cites and asks for comments on the broadcast flag scheme outlined by the Broadcast Protection Discussion Subgroup (BPDG) of the inter-industry Copy Protection Technical Working Group. We refer our remarks to this proposal. The Notice points out that the consensus to mark digital broadcast programming so as to limit its improper use exists only for the so-called flag but not for enforcement mechanisms or criteria for approving the use of specific protection technologies in consumer electronics devices. We also question the level of consensus. We do not recall being asked, until now, whether or not such a scheme might adversely impact the ability of a person who is blind to use broadcast content. We suggest the characterization of this proposal as a “consensus” is premature at best.

We urge the Commission to reject this approach. FCC adoption of a mandated mechanism which provides no criteria for enforcement except that which may be set by members of the BPDG and provides no criteria for approved use of specific technologies, except that which may be approved by the BPDG, is not in the public interest.

This approach also represents a significant threat to the innovative development of access technology for people who are blind or visually impaired. It may be sobering to recognize that the very existence of “assistive technologies,” now well known for their ability to equalize the opportunity for participation in society, would not exist but for reverse engineering of commercial hardware and software in order to interject an accessible interface and to obtain content repurposed into accessible formats. Only after such efforts demonstrated the efficacy of assistive technologies were commercial vendors forced to take cognizance of including persons with disabilities in their technology decisions. Certainly, they do not yet do so routinely. Therefore, we would be very wary of any such promise which may be proffered in this proceeding.

We also note the following specific concerns. First, this is a significant impairment of fair use in that the scheme asks the apparent acceptance of a doctrine that authorized uses can now only be made with so-called authorized technologies. The BPDG approach is even more damaging. It offers no clear standard-setting process within which access technology developers could work or any means for rebutting the presumption that such technology might result in unauthorized distribution, except that which might be provided by the BPDG at some future time. It is simply left to the imagination, or some future negotiation under a yet unknown standard, as to how an access technology developer would design a product which would allow a blind user to access digital broadcast device controls to even know that what is on screen contains a broadcast-flagged product with significant use restrictions.

Second, the Notice points out that the BPDG did not achieve consensus with regard to so-called robustness requirements to be associated with the broadcast flag. However, the June 3, 2002 final discussion draft of the BPDG "Requirements for the Protection of Unencrypted Digital Terrestrial Broadcast Content Against Unauthorized Distribution's" proposed robustness standards seems to contemplate a secure lockup system which would clearly defeat our most successful access application technology. This is of particular concern to us. In general, a process which permits open access to program and system information has the best likelihood of ensuring the development of application programming interfaces that facilitate the development and support of accessibility features which can be deployed in a manner which allows people who are blind to have access to the broad range of digital works, potentially including digital media, while insuring fair use and copyright protection.

CONCLUSION

We wish to make it clear that our concern is not with the existence of anti-copying technology. We are concerned that this Notice and the approaches contained therein show that little, if any consideration has been given to the manner in which users who are blind, in carrying out fair-use activities, will have interface to equipment implementing the standards discussed. In fact, the only references we find in the discussion draft respecting end users have to do with accomplishing the frustration of attempts to discover how the technology works or to even provide a service menu option for authorized circumvention options. We hold little hope that persons who are blind can participate in such an environment. All the gains which we have enjoyed as a result of technology would be sacrificed by this approach as we are relegated to a dependence on others to do for us what we had so recently been able to do for ourselves. Certainly this is not progress, especially given that robust solutions based on open, published protocols that would allow us to participate, exist.

Respectfully submitted,

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